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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

DOCKET NO.

73-31

STATE OF NEW JERSEY and HOWARD YEAGER,
Principal Keeper of the New Jersey State Prisons,

Petitioners,

vs.

UNITED STATES OF AMERICA ex rel. ISIAH MACON

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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OBJECTION TO JURISDICTION

Rule 22 of the Supreme Court of the U.S. provides as follows:

"*Rule* 22. Review on certiorari—time for petitioning

1. A petition for writ of certiorari to review the judgment of a state court of last resort in a criminal case shall be deemed in time when it is filed with the clerk within ninety days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding sixty days.

2. A petition for writ of certiorari to review the judgment of a court of appeals in a criminal case shall be

deemed in time when it is filed with the clerk within thirty days after the entry of such judgment. A justice of this court, for good cause shown, may extend the time for applying for a writ of certiorari in such cases for a period not exceeding thirty days. If the original judgment in such a case was entered in a district court in Alaska, Guam, Hawaii, Puerto Rico, the Virgin Islands, or the Canal Zone, the petition shall be deemed filed in time if mailed by air-mail under a postmark dated within the thirty-day period or due extension thereof."

The mandate of the United States Court of Appeals for the Third Circuit was entered on March 30, 1973. The Petition for Certiorari filed by the State of New Jersey was docketed in the office of the Clerk of the U.S. Supreme Court on June 29, 1973.

The Petition for Certiorari was filed 91 days after the issuance of the mandate of United States Court of Appeals for the Third Circuit. No application was made by the Petitioner to a justice of the U.S. Supreme Court on good cause shown to extend the time within which to apply for the Writ of Certiorari as provided for by *Rule* 22(1).

The Petition for Writ of Certiorari having been tardily filed 91 days after the mandate issued by the U.S. Court of Appeals for the Third Circuit, it is respectfully submitted that the Petitioner is in violation of *Rule* 22(1), and has by its inaction removed this cause from the jurisdiction of this Honorable Court.

ARGUMENT

POINT I

In the consideration of applications for writs of habeas corpus the principles of *Fay v. Noia*, 372 U.S. 391, and *Townsend v. Sain*, 372 U.S. 293, shall in all respects be maintained inviolate without modification.

The State seeks by its petition for certiorari to limit the scope of review in *habeas corpus* proceedings. It complains of the guidelines for review which have been extensively and exhaustively set forth in *Fay v. Noia*, 372 U.S. 391, *Townsend v. Sain*, 372 U.S. 293 and *Sanders v. United States*, 373 U.S. 1. Attempting to justify its petition for certiorari the State asserts a need to review the guidelines heretofore established; the State's petition alleges:

> ". . . This case presents this Court with an opportunity to clarify the responsibility of the lower federal courts in a proceeding involving a collateral attack on a state court conviction, and to limit their prerogative to those cases where intervention is necessary to vindicate a constitutional right gone unrecognized by the state courts."

In limine, it must be pointed out that the attack on the conviction in the state courts in the case *sub judice* was made "head-on," with reference to the federal constitutional question involved. We urged, both on the New Jersey Superior Court and New Jersey Supreme Court levels, that, indeed, there was a violation of the defendant's Sixth Amendment right. The raising of this issue in this fashion can hardly be termed "collateral." As to whether the constitutional issues were raised before the State Courts, the prosecution admits that, "In the present case, the Appellate Division, Superior Court, and the Supreme Court of

New Jersey fully and carefully considered defendant's *constitutional claims . . .* "

The comprehensive and learned opinions of the United States Supreme Court in *Fay* and *Sanders, supra,* detail the origin and purpose of *habeas corpus* proceedings; the guidelines for the propriety of the issuance of writs of *habeas corpus* are clearly set forth.

This Honorable Court in *Fay v. Noia, supra,* and *Townsend v. Sain, supra,* has dealt at length with the circumstances under which a prisoner is entitled to federal relief. No ambiguity or vagueness exists in these opinions which warrant further exposition by this Honorable Court. It is respectfully submitted that, the principles of law that govern, and which are applicable to the present case are patently evident and compelling, and warrant continuing compliance.

Justice Brennan, speaking for the Court in *Fay, supra,* stated:

> ". . . habeas corpus is predestined by its historical role in the struggle for personal liberty to be the ultimate remedy. If the States withhold effective remedy, the federal courts have the power and the duty to provide it. Habeas corpus is one of the precious heritages of Anglo-American civilization."

If it is the purpose of the writ to "vindicate a constitutional right gone unrecognized by the state courts," as the State argues, then the function of *habeas corpus* was well-served in the present cause. It is clear that the New Jersey Supreme Court failed to recognize the import of the constitutional error; it held:

> ". . . the comment of the prosecutor did not trench upon the right secured by the Sixth Amendment in any direct or immediate sense."

Judge Fisher, sitting in the United States District Court, although affirming the conviction, clearly expressed the belief that federal constitutional error was in fact committed. The case at bar was a classic situation warranting the filing of the petition for *habeas corpus.*

The State complains that *habeas corpus* has created a backlog of cases, and results in "one more appeal" for defendants. The State asserts:

> "Such perversion of the Great writ has resulted in a serious backlog in the lower federal courts, and has substantially increased the work load of this Court . . ."

Rebuttal for the concern as to the "backlog" expressed by the State, is found in *Sanders v. United States, supra.* Justice Brennan, speaking for the court held:

> ". . . Conventional notions of finality of litigation have no place where life or liberty is at stake and infringement of constitutional rights is alleged. If 'government . . . [is] always [to] be accountable to the judiciary for a man's imprisonment,' *Fay v. Noia, supra* (372 U.S. at 402), access for the courts on habeas must not be thus impeded. The inapplicability of res judicata to habeas, then, is inherent in the very role and function of the writ."

Justice Brennan, in *Fay v. Noia, supra,* detailing the origin of the Great writ, states:

> ". . . habeas corpus in the federal courts provides a mode for the redress of denials of due process of law. Vindication of due process is precisely its historic office . . ."

In the various reviews of this cause the prosecutor's remark was termed (1) "improper" by the Appellate Division of the Superior Court, (2) "The State Supreme Court

found no Sixth Amendment violation, but nevertheless condemned the remarks of the prosecutor as improper." (Please see State's present Petition to this Court, page 9, lines 23-24), (3) held to be violative of the Sixth Amendment by the U.S. Federal District Court for New Jersey, but not reversible error, (4) unanimously held to constitute reversible constitutional error by the U.S. Court of Appeals for the Third Circuit. Thus it will be seen that while the State Courts impugned the prosecutor's comments, they refused to recognize the federal constitutional implications and to implement the same, thereby compelling the application to the federal courts to "vindicate a constitutional right gone unrecognized by the state courts."

In passing, it may be noted that where the basis for the *habeas corpus* petition stems from improper remarks of the Prosecutor, violative of the defendant's constitutional rights, it must be borne in mind that it is the Prosecutor's conduct which brings about such error. If prosecutors wish to curtail the number of petitions for *habeas corpus,* we respectfully suggest that a more studied and cooperative attempt be made by them to adhere to the word and spirit of the Constitution, and thus avert errors leading to applications for writs of *habeas corpus.*

The State further complains that:

> ". . . once the Circuit Court determined that the State Court had fairly considered defendant's claims, applying the correct legal standard, its function on review of a state judgment was properly completed."

It is difficult to fathom the State's logic or correctness of this statement. The two Federal Courts in the case *sub judice* never concluded "that the State Court[s] had fairly considered defendant's claims . . . ," thus this statement falls of its own lack of substance. That the "correct legal

standard" was invoked by the State Courts is also totally in error, and it was precisely because of the absence of correct legal standards employed by the State Courts that relief was sought in the federal tribunals.

It is further argued by the State, referring to the Circuit Court's action, that "it should have had no occasion to go further and substitute its subjective judgment for that of the State Supreme Court." A critical appraisal of the action of the Court of Appeals for the Third Circuit makes manifest the propriety of its action. The U.S. District Court recognized that federal constitutional error involving the Sixth Amendment had been committed, but that the error was harmless. The Circuit Court reviewing the findings of the U.S. District Court, and after considering the entire record, and pursuing the law as laid down in *Chapman v. California*, 17 L.Ed.2d 705, concluded that the violation of the defendants constitutionally guaranteed right of counsel may have had the effect of raising in the jurors' minds the inference that petitioner was, or at least believed himself to be guilty. Such an inference might certainly tend to cause the jury to disbelieve Macon's version of the story. The Court further opined: "Under these circumstances, the possibility of prejudicial impact is present and we, therefore, are unable to conclude that the prosecutor's comment was *'harmless beyond a reasonable doubt.'*"

The Circuit Court was fully mindful of its solemn duty under the rules laid down in *Chapman, supra*, and *Fahy v. Connecticut*, 375 U.S. 85, 11 L.Ed.2d 171, 84 S. Ct. 229. Recognizing its obligation and function, it concluded:

> ". . . Frequently, appellate courts are called upon, in performing an appropriate reviewing function, to determine whether any error that has been committed

> may be adjudged 'harmless.' So often, this is an assignment not free from deep concern. But because it is required, we must resolutely and objectively discharge it, whatever our own personal predilections may be."

It is respectfully submitted that the State has not met its burden by demonstrating any fact or factors as required under *Chapman, supra,* or *Fahy, supra,* to show that the federal constitutional error was "harmless." The *Fahy* Court holding that an error of constitutional dimension is not harmless if "there is a reasonable possibility that (it) might have contributed to the conviction."

Point II

Federal constitutional error being demonstrated the State has the burden of proof that the error was harmless under *Chapman v. California,* 17 L.Ed.2d 705, and *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed.2d 171, 84 S. Ct. 229.

In *Chapman v. California,* 17 L.Ed.2d 705 (at p. 710), the United States Supreme Court noted the ancient common law rule which ordained that, where error in illegally admitting highly prejudicial evidence or comments was committed, the burden was cast upon the beneficiary of the error to prove that there was not injury to the defendant. Absent such showing, the beneficiary had to "suffer a reversal of his erroneously obtained judgment."

Candor requires us to state that not every federal constitutional error *ipso facto* requires reversal of a conviction. Where the error is harmless, there can be no reversal.

As an aid in determining what constitutes "harmless" error, *Fahy v. Connecticut,* 375 U.S. 85, 11 L.Ed.2d 171,

84 S. Ct. 229, lays down the rule, that those constitutional errors which "affect substantial rights" of a party cannot be treated as harmless.

In *Chapman v. California, supra,* the United States Supreme Court enunciated the "harmless error" rule to be applied in federal constitutional error cases; it employed the approach in *Fahy v. Connecticut, supra,* as to what constituted harmless error, to wit, "whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." The Court declared the harmless error rule as follows: "that before a federal constitutional error can be harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt."

The *Chapman* case, *supra,* 17 L.Ed.2d at page 709, specifically makes this rule applicable to all State Courts of the Union; and used the following significant reasoning:

> "Whether a conviction for crime should stand when a State has failed to accord federal constitutionally guaranteed rights is every bit as much of a federal question as what particular federal constitutional provisions themselves mean, what they guarantee, and whether they have been denied."

Chapman, supra, points out that a State "harmless error" rule shall be invoked only where "errors of state procedure or state law" are involved. Where federal constitutionally guaranteed rights are involved, the test of harmlessness must be that decreed by the United States Supreme Court; the Supreme Court stating, at page 709:

> ". . . we cannot leave to the States the formulation of authoritative laws, rules, and remedies designed to protect people from infractions by the States of federally guaranteed rights."

The thrust of the *Chapman* decision makes compulsory the application of the federal harmless error rule as designed in *Chapman* where federal constitutionally guaranteed rights are derogated.

The *Chapman* decision places the burden of overcoming the prejudice induced by the federal constitutional error, upon the beneficiary of the error—in this case the State. The significant language of the Court in the *Chapman* case is as follows:

> "Certainly error, constitutional error, in illegally admitting highly prejudicial evidence or comments, casts on someone other than the person prejudiced by it a burden to show that it was harmless."

As to the *quantum* of proof required of the State to overcome the prejudice resulting from its action, the Court in *Chapman, supra,* considers the guaranteed federal constitutional rights under the Fifth Amendment sacrosanct and, where these rights are encroached upon by the State, the State must demonstrate beyond a reasonable doubt that the error was harmless.

The Court in *Chapman, supra,* also stated, at page 711:

> ". . . before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. While appellate courts do not ordinarily have the original task of applying such a test, it is a familiar standard to all courts, . . ."

The right to assistance of counsel is a federal constitutional right, Amendment 6 of the United States Constitution. (See *N.J. Constitution of 1947,* Article 1, Para. 10 for its counterpart.) It is a matter of substance, and not merely one of form. *U.S. v. Stahl,* (C.A. 111) 393 F.2d

101 (1968). It is a fundamental right, *State v. Ballard,* (1951) 15 N.J. Sup. 417, *affirmed* 9 N.J. 402; *U.S. v. Myers,* 253 F. Supp. 23 (1966), of equal dignity with the other rights which an accused enjoys under the Sixth Amendment, *Anderson v. City of El Dorado,* 418 S.W.2d 801 (Ark. 1967). See 23A *C.J.S.,* P. 89. It includes the right of consultation, *Maye v. Pescor,* 162 F.2d 641, *affirmed* 214 F.2d 860; *Lewis v. Sanford,* 79 F. Supp. 77 (D.C. Ga. 1948). See, also, *Altmair v. Sanford,* 148 F.2d 161, 162; 21 Am. Jr. 2d Criminal Law §312. The substantial protection of the right of an accused to counsel is jurisdictional, being essential to the validity of a judgment of conviction. *Thompson v. King,* (C.C.A. Mo., 1939) 107 Fed.2d 307.

Recent pronouncements of the United States Supreme Court have held that the Sixth Amendment right to assistance of counsel is applicable to the States by incorporation of the provision into the due process clause of the Fourteenth Amendment. *Gideon v. Wainwright,* (1963) 372 U.S. 335, 9 L.Ed.2d 799, 83 S. Ct. 792, 93 A.L.R.2d 733; *Malloy v. Hogan,* 378 U.S. 1, 12 L.Ed.2d 653, 83 S. Ct. 1489; *Escobedo v. Illinois,* (1964) 378 U.S. 478, 12 L.Ed.977, 84 S. Ct. 1758.

In *Massiah v. U.S.,* 12 L.Ed.2d 246, 84 S. Ct. 1199, the Court in dealing with the right of an accused to assistance of counsel when being interrogated by the police, made the telling observation that:

> "Anthing less—might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him."

As the United States Supreme Court so succinctly stated in *Miranda v. Arizona,* 384 U.S. 436, 16 L.Ed.2d 694 (1966) at p. 727:

> "If the individual desires to exercise his privilege, he has a right to do so. This is not for the authorities to decide."

It is, therefore, of vital significance that the suspect be shielded by the constitutional protection at a time when it is important for him to avail himself of it. Such an occasion arises when he is called upon by the police to speak, see *Massiah v. U.S., supra.*

The indirect, inferential attack on constitutional guarantees is an insidious device to render the rights of the accused ineffectual. The defendant is "entitled to a trial free from the pressure of unconstitutional inferences," *Chapman v. California, supra; State v. McElroy,* 96 N.J. Super. 582 (App. Div. 1967) (holding that the inference from prosecutor's comment to the jury was, in effect, an infringement of defendant's Fifth Amendment right to remain silent.)

It is recognized in various state jurisdictions throughout the country that comments of counsel which invite avenues of improper speculation are not to be countenanced by the courts, *Smith v. State,* 25 Ala. App. 183, 142 So.779 (1939); *People v. Teiper,* 186 A.D. 830, 175 N.Y.S. 197 (1919); *mod.* 188 A.D. 949, 178 N.Y.S. 54 (1919). The respondent, Isiah Macon, has maintained that the Prosecutor's comment in summation was not mere harmless error but, rather, that the comment constituted harmful constitutional error and placed upon the State the *onus* of proving beyond a reasonable doubt that the comment did not contribute to the jury's verdict and was harmless.

The New Jersey Superior Court, Appellate Division, held:

> "We agree with defendant that the prosecutor's allusion in summation to defendant's calling his lawyer the morning following the fatal affray was improper . . ."

The U.S. District Court for New Jersey, speaking through Judge Fisher, recognized the prejudicial import and effect of the objectionable comment, when he stated:

> "The questionable comment only had to have a possible harmful effect on petitioner's rights to make it constitutional error. Here this comment could have had such an effect.
>
> Where the prosecutorial intent of such comment is to inflict a penalty upon the defendant for the exercise of his rights, through the raising of an adverse inference of guilt in the minds of the jury, such comment clearly would produce constitutional error."

The State of New Jersey maintains that the Prosecutor's comment in summation did not constitute constitutional error because "[a]t the time defendant called his attorney (prior to his arrest) he was in fact not guaranteed the right to counsel under the Sixth Amendment." *Hoffa v. United States*, 385 U.S. 293 (1966). This argument is predicated on a principle inapplicable to the present cause.

The Honorable Judge Fisher, as to the State's reliance on *Hoffa, supra*, stated:

> "It [Hoffa] merely states that there is no necessity of warning someone of his rights when he is talking to a police informer. A person always has the right to confer with counsel. *Escobedo, supra; Miranda v. Arizona*, 384 U.S. 436 (1966), and related cases only say when the police must inform a suspect of his right to counsel or provide it for him. They do not preclude a person from seeking the assistance of counsel prior to arrest on his own, nor do they make that any less of a constitutional right."

In effect, the issue before this Honorable Court is not as to the time at which right to counsel must be afforded, or as to the necessity of warning someone of his right to counsel, but rather the scope of the right to consult counsel at the pleasure of the individual.

The State further attempts to dilute the impact of the Prosecutor's comment by insisting that "the fact of seeking

counsel in the face of legal predicament is as consistent with innocence as with guilt." Judge Fisher observed this argument by the State . . .

> ". . . goes not to the nature of the comments but rather to the determination of the possible prejudice that might have resulted from them. The questionable comment only had to have a possible harmful effect on petitioner's rights to make it a constitutional error. Here this comment could have had such an effect. Macon could have been penalized for consulting his attorney. This possibility alone is enough to make the comment constitutional error."

This contention by the State further fails to heed the analogous warning of Mr. Justice Douglas in *Griffin v. California*, 380 U.S. 609, 614 (1965), wherein he stated: "What the jury may infer, given no help from the court [here, the prosecution], is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another."

The State also seeks to dilute the gravity of the Prosecutor's remark by insisting that "it was but an isolated comment in an extended summation." If the unconstitutional comment were made at the early stages of the trial, it might be fairly argued that the interval between the comment and its consideration by the jury was so great that the statement was not "impressioned upon the minds of the jury." But, where, as here, the objectionable comment came in the final phase of the trial, *i.e.*, immediately before the jury's deliberation, an entirely different consideration arose.

The State's argument also fails to take into account the precise holding of *Griffin:* Comment by the court or the prosecution which penalizes the exercise of a constitutional right (in *Griffin*, the right to stand silent) is strictly

forbidden, *Id.* at 615; the Court, in *Griffin*, did not hold that there must be a repetition of the intolerable remark for there to be constitutional error.

Finally, respondent must take issue with the State's subjective conclusion that "[t]here was no reasonable possibility that the error affected the verdict." Though Judge Fisher noted that the "error complained of amounted to one short statement during the course of a three week trial," it cannot go unnoticed or undisputed that this error possessed, at the very least, the potential of "raising in the jurors' minds the inference that . . . [Macon] was, or at least believed himself to be, guilty."

Judge Adams, speaking for the Third Circuit, below, in a well-reasoned opinion, subscribing to the principles set forth in *Chapman v. California, supra,* significantly noted:

> "In the present case, because critical portions of the evidence were disputed, the credibility of the petitioner as a witness was a central issue. This is not a situation where the case against the petitioner was otherwise 'so overwhelming' that the constitutional error did not, beyond a reasonable doubt, contribute to the conviction. *Cf. Milton v. Wainwright*, 407 U.S. 371 (1972); *Harrington v. California*, 395 U.S. 250 (1969). The prosecutor's comment concerning Macon's consultation with counsel the day after the shooting incident would appear to have been directed to, and may have had the effect of, raising in the jurors' minds the inference that petitioner was, or at least believed himself to be, guilty. Such an inference might certainly tend to cause the jury to disbelieve Macon's version of the story. Under these circumstances, the possibility of prejudicial impact is present and we, therefore, are unable to conclude that the prosecutor's comment was '*harmless beyond a reasonable doubt.*' . . ."
>
> "Thus we are constrained to agree with the district court that the prosecutor's comment to the jury was

> constitutional error. However, we are unable to conclude, as the district court did, that such error was 'harmless beyond a reasonable doubt.' *Chapman v. California*, 386 U.S. 18, 24 (1967). The Supreme Court has stated that an error of constitutional dimension is not harmless if 'there is a reasonable possibility that (it) might have contributed to the conviction' *Fahy v. Connecticut*, 375 U.S. 85, 86-7 (1963). The state must 'prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.' *Chapman, supra* at 24.

Judge Adams, in further recognition of the principles set forth in *Chapman* and *Fahy, supra*, stated:

> "While the error may not have contributed to petitioner's conviction, this Court is simply unable to conclude, on the basis of an independent examination of the record, that 'there is (not) a reasonable possibility that (it) might have contributed to the conviction,' and this is the test mandated by the Supreme Court in *Fahy v. Connecticut*, 375, U.S. 85, 86-7 (1963). Frequently, appellate courts are called upon, in performing an appropriate reviewing function, to determine whether any error that has been committed may be adjudged 'harmless.' So often, this is an assignment not free from deep concern. But because it is required, we must resolutely and objectively discharge it, whatever our own personal predilections may be."

CONCLUSION

It is with the utmost deference submitted that this case affords no basis whatsoever warranting the change of the existing law enunciated in *Fay v. Noia, supra, Chapman v. California, supra,* or *Fahy v. Connecticut, supra.*

Respectfully submitted,

STEPACOFF, KOCH & KROOP

By: /s/ Gary A. Kroop
GARY A. KROOP